RECORD AND BRIEFS

Nos. 15-1358, 15-1359, 15-1363

IN THE

Supreme Court of the United States

JAMES W. ZIGLAR, *Petitioner*,

v.

AHMER IQBAL ABASSI, ET AL., *Respondents*.

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, ET AL., *Petitioners*,

v.

AHMER IQBAL ABASSI, ET AL., *Respondents*.

DENNIS HASTY, ET AL., *Petitioners*,

v.

AHMER IQBAL ABASSI, ET AL., *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Second Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, is a voluntary national bar association whose members primarily represent individual plaintiffs in civil actions, including personal injury actions, employee rights cases, and consumer protection litigation.[1] An important element of AAJ's mission is to protect and preserve Americans' constitutional right to trial by jury and access to the courts.

AAJ is concerned that Petitioners in this case seek to impose a heightened standard of pleading ordinary claims governed by Federal Rule of Civil Procedure 8(a). AAJ believes that this requirement is not supported by this Court's precedents and would invade the province of the jury in violation of the Seventh Amendment.

SUMMARY OF ARGUMENT

1. This Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), held that to survive a motion to dismiss for failure to state a claim a complaint must set forth factual content that allows the court to draw the reasonable inference that the defendant is liable for

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[1] All parties have consented to the filing of this *amicus curiae* brief, and copies of the emails granting consent have been filed with the Clerk. The undersigned counsel for *amicus curiae* affirms, pursuant to Supreme Court Rule 37.6, that no counsel for a party authored this brief in whole or in part and no person or entity other than AAJ, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

the misconduct alleged. The complaint in this case satisfies that requirement.

The standard applied by the lower court is easily discerned from its refusal to dismiss the claim that Defendants knowingly detained Plaintiffs under extremely harsh conditions, even though they were aware that the government had no individualized suspicion that any of the Plaintiffs had ties to terrorism. Plaintiffs' allegations regarding the conditions of their confinement were specific and based on firsthand experience. The court below inferred discriminatory intent on the part of Petitioners based in large part on Plaintiffs' allegations that each of the Defendants received detailed daily reports concerning the investigation of the individual detainees as well as the central roles Defendants played in the September 11 investigation.

Where the factual allegations could support two reasonable explanations Plaintiffs' complaint would survive the motion to dismiss. The court acknowledged that discovery may reveal that the inferences supporting Plaintiffs may be in error and that Defendants may ultimately be found not liable. However, on motion to dismiss, Plaintiffs were not required to prove their allegations, but only to plausibly plead them.

Petitioners argue to the contrary that where an explanation of the alleged facts consistent with their innocence is at least as likely, Plaintiffs' allegations founder and must be dismissed as implausible.

2. Petitioners' proposed pleading standard is not consistent with *Iqbal*. Indeed, this Court there emphasized that plausibility is not a probability

requirement. Nor does it require a plaintiff to demonstrate the merits of his or her case. Its purpose instead is to give the defendant fair notice of the nature of the claim and the grounds on which the claim rests.

It is well settled that a court passing on a Federal Rule of Civil Procedure 12(b)(6) takes all of plaintiff's factual allegations as true and draws all reasonable inferences in plaintiff's favor. Federal courts have overwhelmingly relied on this principle in applying the *Iqbal* plausibility standard. It follows that there can be more than one plausible explanation for a given set of facts and that the court is not obliged to determine which is more plausible or likely than another. This Court has indicated that a "more likely" standard would be too stringent a pleading requirement in ordinary cases, and the federal courts of appeals have broadly found reversible error in dismissals based on the district court's view that the inferences supporting defendants are more likely.

3. Petitioners' heightened pleading requirement necessarily involves the court in making factual assessments in violation of the fact finding role of the jury. The history of the Seventh Amendment underscores the fundamental importance of the right to trial by jury in civil cases. This Court has historically safeguarded that right. The fact that a procedural rule will be more efficient for the judicial system or less onerous for defendants cannot justify erosion of the parties' right to insist that the jury determine the facts of their case.

The Seventh Amendment preserves the right to a jury trial in suits tried to juries under the English common law in 1791. It also precludes procedural

rules that take such cases away from the jury, except as permitted by common law rules existing at that time. A rule that did not exist at that time will nonetheless be upheld so long as it preserves the substance of the common law jury trial.

The closest analog to the Rule 12(b)(6) motion to dismiss is the common-law demurrer to the pleadings, the only common law procedural rule that would allow a judge to determine pretrial that a case should be withheld from the jury. Under the demurrer to the pleadings, the movant was required to admit the truth of the factual allegations as well as all reasonable inferences therefrom and submit to the judge the purely legal question of whether a cause of action existed. The common law demurrer to the evidence similarly admitted all the facts in evidence, as well as every adverse inference that could be drawn therefrom, as true. The common law judge was not called upon to weigh the merits or the likelihood of the plaintiff's explanation of the facts. Thus, Petitioner's standard for dismissal was not a rule known to the common law.

Nor does that proposed standard preserve the substance of the common law jury trial. This Court has repeatedly stated that the heart of the right to trial by jury—and the aim of the Seventh Amendment—is to preserve the common law distinction whereby issues of law are decided by the court and issues of fact are decided by the jury. Petitioners' "more likely" standard plainly violates that vital characteristic of the jury trial.

ARGUMENT

I. The Court of Appeals Below Properly Applied the *Iqbal* Pleading Standard.

AAJ addresses this Court with respect to the third question presented. That question, variously framed by petitioners in these consolidated cases, asks whether Plaintiffs' allegations against Petitioners are sufficient to state a plausible claim to relief under the pleading requirements established by this Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). All three Petitioners contend that the court below did not faithfully apply the *Iqbal* pleading requirements. Brief for the Petitioners John D. Ashcroft and Robert Mueller ("Ashcroft Br.") 40; Brief for Petitioners Dennis Hasty and James Sherman ("Ashcroft Br.") 46; Brief of Petitioner James W. Ziglar ("Ziglar Br.") 22.

AAJ contends to the contrary that the Second Circuit applied the *Iqbal* pleading standards properly. Further, in AAJ's view, the more stringent standard urged upon this Court by Petitioners is not consistent with *Iqbal*, is not consistent with the motion to dismiss standards universally applied by the federal circuit courts of appeals following *Iqbal*, and is not consistent with the constitutional right to trial by jury guaranteed by the Seventh Amendment.

A. The court below properly held that Plaintiffs' allegations allow the reasonable inference that Defendants are liable for the alleged misconduct.

In *Iqbal* this Court held that to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain

sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" 556 U.S. at 678 (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). A claim satisfies this plausibility standard if Plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. The complaint in this case well exceeds that standard.

AAJ does not undertake a close analysis of the facts and inferences detailed in the plaintiffs' complaint, as these are thoroughly discussed by the parties. AAJ, however, is intensely interested in the pleading standards applied by the Second Circuit and challenged in this Court by Petitioners. As this Court stated in *Iqbal*, these standards apply "to all civil actions," with limited exceptions, *id.* at 684 (citing *Twombly*, 550 U.S. 555-56 & n.3). Those include civil actions in which AAJ members seek to vindicate the rights of those who have been wrongfully injured or harmed.

The pleading standard applied by the lower court is easily discerned from the court's assessment of a central issue in Plaintiffs' claim that Defendants deprived them of their constitutional rights: That Petitioners subjected Plaintiffs to harsh conditions of confinement for no legitimate governmental purpose, but "simply because he happened to be—or, worse yet, appeared to be—Arab or Muslim." *Turkmen v. Hasty*, 789 F.3d 218, 245 (2d Cir. 2015).

The September 11 attacks were unique, not only in the scope of destruction, but also in the intense response of law enforcement and the fearful confusion of many Americans, who had little understanding of

their attackers. Sentiments that all Arabs or Muslims should be punished for the crimes of 19 Saudis were not uncommon.

Plaintiffs were arrested in the course of this investigation for various immigration law violations. They were detained at the administrative maximum special housing unit ("ADMAX SHU") while the FBI cleared each detainee of any connection with terrorists or terrorist activities. This Court has noted that these arrests and detentions could be justified as a precaution against unwittingly allowing a person guilty of the Sept. 11 attacks to escape the country. *Iqbal*, 556 U.S. at 682. Plaintiffs here are not challenging their arrests or initial detention. Instead, they allege that the harsh conditions of their confinement in the absence of any individualized suspicion of ties to terrorism violated their constitutional rights.

The conditions Plaintiffs endured at the ADMAX SHU were indeed harsh. Detainees were confined to small cells for 23 hours a day. First Am. Compl. ("FAC") ¶ 76 They were shackled and chained whenever they did leave their cells, *id.* at ¶ 76, and were physically and verbally assaulted. *Id.* at ¶¶ 105, 109 & 136. They were deprived of sleep, *id.* at ¶ 119, adequate food, *id.* at ¶ 128, and proper medical attention, *id.* at ¶ 108. They were strip searched whenever moved from their cells, and sometimes randomly in their cells. *Id.* at ¶¶ 112 & 113. Those strip searches were frequently accompanied by verbal insults, ridicule, videotaping and physical assault, all in violation of written policy. *Id.* at ¶ 116. Their "recreation" exposed them to the elements in freezing weather with inadequate clothing. *Id.* at ¶ 122.

These and other allegations of harsh treatment were specific and based on first-hand experience. The court below concluded that these conditions were not justified by the need to investigate possible terrorist connections, and "were not reasonably related to a legitimate goal, but rather were punitive and unconstitutional." 789 F.3d at 245 (citing *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)).

Still, as this Court made clear in *Iqbal*, the governmental officials in charge of Plaintiffs' confinement "may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." 556 U.S. at 676. A plaintiff must plead that the officials themselves "acted with discriminatory purpose." *Id.*

As is often the case, plaintiffs cannot point to a document or recorded statement in which Petitioners directly expressed a discriminatory purpose for their actions. Nevertheless, this Court stated, "discrete wrongs—for instance, beatings—by lower level Government actors . . . if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners' part." *Id.* at 683.

The court below determined that Petitioners were entitled to that inference because they plausibly pleaded that the Defendants knew of the severe conditions imposed on the ADMAX SHU detainees and knew that the government had no individualized suspicion that any of the Plaintiffs had any connection to terrorism. This was sufficiently pleaded both with respect to the DOJ Defendants (Petitioners Ashcroft, Mueller, and Ziglar), 789 F.3d at 242, and with respect to MDC Defendants (Petitioners Hasty and Sherman). *Id.* at 248.

Plaintiffs' allegations in this regard are detailed and specific. Investigation of the attacks and the search for those responsible were the highest priority of federal law enforcement agencies in the months following September 11. Petitioners were closely involved in directing that endeavor. FBI Director Mueller ordered that the investigation be run out of FBI Headquarters, under his direct control. FAC ¶ 56. He "was in daily contact with the FBI field offices regarding the status of individual clearances." *Id.* ¶ 57. Ashcroft, Mueller and a small group of high government officials met regularly and "mapped out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation," *Id.* ¶ 61. The punitive conditions in which Plaintiffs were held were the direct result of this strategy. *Id.* ¶ 65. Attorney General Ashcroft insisted on receiving regular, detailed reports, including a daily Attorney General's Report on persons arrested and other developments, which he used to brief the President and the National Security Council on the progress of the investigation. *Id* ¶ 63. Commissioner Ziglar attended the small group discussions regarding the confinement of 9/11 detainees. *Id.* ¶ 62. He received twice-daily briefings with his staff regarding the detentions, which provided information for his briefings to the Attorney General. *Id.* ¶ 64. On this basis, Plaintiffs alleged that "Ashcroft, Mueller and Ziglar knew that the FBI had not developed any reliable evidence tying Plaintiffs and class members to terrorism, yet authorized their prolonged detention in restrictive conditions nonetheless." *Id.* ¶ 67.

The court determined that Plaintiffs' allegations were well-pleaded and "render plausible the claim that" the DOJ Defendants knew of the MDC

Plaintiffs' confinement under severe conditions and knew "the government had no evidence linking the MDC Plaintiffs to terrorist activity." 789 F.3d at 246. The court recognized that this claim was not a fact to be assumed true, but rather it was a reasonable inference from those facts. Given the steady stream of information to the DOJ Defendants and their central roles in the investigation, "it seems to us plausible that information concerning conditions at the MDC . . . reached the DOJ Defendants." *Id.* at 240.

> Of course, we cannot say for certain that daily reports given to Ashcroft and Mueller detailed the conditions at the ADMAX SHU or that the daily meetings of the SIOC Working Group (containing representatives from each of the DOJ Defendants' offices) discussed those conditions. But on review of a motion to dismiss, Plaintiffs need not prove their allegations; they must plausibly plead them.

Id.

Similarly, the daily reports each DOJ defendant received regarding the status of the investigation and the detainees "support the reasonable inference" that the defendants learned "within weeks of 9/11" that detainees were being held "for whom the FBI had not developed any reliable tie to terrorism." *Id.* at 241. The court also noted Plaintiffs' allegation that some Justice Department officials had expressed misgivings about the conduct of the investigation, and stated that, in view of the daily briefings, "[t]he DOJ defendants were unlikely to have remained unaware of these concerns," *Id.* at

254. Further, conditions in the ADMAX SHU soon began to receive media attention, as the OIG Report pointed out. "[I]t seems implausible that the public's concerns did not reach the DOJ Defendants' desks. *Id.* at 240.

With respect to Warden Hasty and Associate Warden Sherman, the Complaint alleged that they ordered and approved the "extremely restrictive conditions of confinement" in the ADMAX SHU. FAC ¶¶ 24 & 75, even though both "were aware that the FBI had not developed any information" connecting Plaintiffs to terrorism. *Id.* at ¶ 69. Hasty and Sherman received regular written updates explaining why each detainee had been arrested and "evidence relevant to the danger he might pose" to the MDC, yet these updates often lacked any indication of a suspicion of a tie to terrorism. *Id.* at ¶ 69. The court below concluded that plaintiffs had plausibly pleaded a substantive due process violation based on detaining them in restrictive conditions knowing that there was no individualized suspicion tying any of them to terrorism. 789 F.3d at 248.

Plaintiffs also pleaded that Hasty could be liable for abuses committed by MCD guards, alleging that Hasty ignored evidence of abuses and disregarded reports by staff and detainees of physical and verbal abuse. FAC ¶¶ 77-78, 107, 110. The court concluded that these factual allegations "permit the inference that [Hasty] knew that MDC staff subjected the MDC Plaintiffs to the 'unofficial abuses' and permitted—if not facilitated—the continuation of these abuses." 789 F.3d at 250.

The lower court made clear that on motion to dismiss a plaintiff is not required to identify evidence

that would support a verdict in his favor. As the court noted, "Discovery may show that the Defendants—the DOJ Defendants, in particular—are not personally responsible for detaining Plaintiffs in these conditions. . . . The question at this stage of the litigation is whether the MDC Plaintiffs have plausibly pleaded that the Defendants exceeded the bounds of the Constitution in the wake of 9/11. We believe that they have." *Id.* at 264.

The court also pointed out that the pleaded facts could reasonably support two conflicting inferences and that both could be plausible. The court indicated that its role was not to weigh one against the other. "Because either is plausible, it is irrelevant that only inference (a) supports the conclusion" claimed by Plaintiffs. *Id.* at 243.

Petitioners assert several grounds for reversal. Of primary concern to AAJ is their contention that the court below was not entitled to draw the inferences described above because alternative explanations for the facts consistent with innocence were at least as likely.

B. Defendants argue that the existence of more likely alternative inferences requires dismissal.

Petitioners do not seriously dispute plaintiffs' factual allegations concerning the conditions of their confinement. However, they offer alternative explanations for those facts. The DOJ Defendants contend that, as in *Iqbal*, "the challenged actions 'were likely lawful and justified by [a] nondiscriminatory'—and nonpunitive—intention 'to detain aliens who were illegally present in the United

States and who had potential connections to those who committed terrorist acts.'" Ashcroft Br. 42-43 (quoting *Iqbal*, 556 U.S. at 682).[2]

Petitioners Ashcroft and Mueller repeatedly assert that a court may not draw any inference from factual allegations that is not as likely as or more likely than competing alternative inferences offered by Defendants. For example, one issue involved the decision to merge the national INS list of of-interest arrestees with the New York FBI's list which contained many detainees with no basis for suspicion of terrorism. The DOJ Defendants contend that Plaintiffs' "theory of liability founders because the most likely explanation for the [lists-merger] decision is unconnected to any discriminatory purpose." Ashcroft Br. 17. They also reject Plaintiffs' allegation that the Attorney General made the decision to merge the lists, arguing that an alternative reading of the Inspector General's report suggests that the decision was made by Deputy Attorney General Levey. Ashcroft Br. 45. *See also id.* at 48 (The "inference of

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[2] In fact, the "challenged actions" quoted by Ashcroft were "the arrests Mueller oversaw." 556 U.S. at 682. The purported nondiscriminatory intent for holding Plaintiffs in the harsh conditions at ADMAX SHU is belied by the fact that such conditions were not deemed warranted for PENTBOM detainees at the Passaic County Jail or other non-federal facilities. FAC ¶ 66. In addition, immigration arrestees who were not Arab or Muslim (or Arab or Muslim in appearance) were not subjected to these conditions. *Id.* at ¶¶ 43 & 60c. By contrast, a Nepalese Buddhist, was held at ADMAX SHU because a government employee mistakenly reported seeing an "Arab male" taking photographs. *Id.* at ¶ 230. Moreover, many detainees remained confined in the ADMAX SHU even after having been cleared of any terrorist ties by the New York FBI field office and FBI Headquarters. *Id.* at ¶ 188.

discriminatory intent on Ashcroft's part is belied by the obvious alternative explanation for the lists-merger decision," *i.e.* concern that the FBI could unwittingly permit a dangerous individual to be released.). On another issue, also equating "likely" with "plausible," *see id.* at 46 ("Nor is it likely (as opposed to merely possible) that the regular arrest reports provided to petitioners indicated that some individuals were being detained without any evidence of a potential connection to terrorism.").

Petitioner Ziglar similarly contends that "where there exists an obvious alternative explanation for actions that the FAC alleges, . . . the respondents' claims of unconstitutional motive [are] implausible." Ziglar Br. 31. He argues, for example, that the allegation that the DOJ defendants "maintained restrictive confinement after learning that the FBI had not made individualized assessments" are implausible because a court cannot conclude "that defendants were not *more likely* concerned with national security than with discrimination on basis of race or religion." (emphasis added).

The MDC Defendants also suggest that, to be plausible, a claim must negate alternative inferences that would favor the defense. They contend, for example, that the FBI updates, from which the court inferred that Hasty and Sherman were aware of the lack of individualized suspicion, could also be interpreted as containing only information relevant to potential dangers to the MDC itself, consistent with their belief that the FBI would not send into a prison "*all* the potentially sensitive domestic and foreign intelligence information it was obtaining about detainees." Hasty Br. 49 (emphasis in original).

Hasty further suggests that "[n]ecessary delegation of authority and reliance on subordinates provides a far 'more likely' explanation" for his perceived indifference to evidence of abuses by guards at the ADMAX SHU. Hasty Br. 56. *See also id.* at 50 & 51 (faulting the lower court for not accepting an alternative "more likely" interpretation of allegedly false statement in memorandum). As with the claims against the DOJ Defendants, the court indicated that "[r]ecord proof may eventually establish that the MDC Plaintiffs' claim" is more limited. 789 F.3d at 249. However, at the motion to dismiss stage, "we conclude that the MDC Plaintiffs plausibly plead a substantive due process claim against Hasty and Sherman." *Id.*

II. The Pleading Standards Proposed by Petitioners Are Not Supported by *Iqbal*.

A. *Iqbal* does not require the court to weigh the likelihood of Plaintiff's allegations and inferences against competing inferences favoring Defendant.

Although *Iqbal* used the term "likely" in the context of the facts of that case, 556 U.S. 681, the Court made clear that the test it applied was whether "the factual allegations in respondent's complaint . . . *plausibly* suggest an entitlement to relief." The Court also made clear that this pleading standard is not a "more likely than not" standard. Obviously there can be more than one reasonable inference from a given set of facts. The Court in *Iqbal* emphasized that a court on motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is not called upon to determine whether one interpretation of the facts is more likely than the other. "The plausibility standard is not akin

to a 'probability requirement.'" 556 U.S. at 678, referring to this Court's fuller explanation of this point in *Twombly:*

> Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal[ity]. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

550 U.S. at 556 (internal quotation marks omitted).

The purpose of this pleading requirement is not to require the plaintiff to demonstrate the merits of his or her case at this early stage, but to "satisfy the requirement of providing not only fair notice of the nature of the claim, but also grounds on which the claim rests. *Id.* at 555 n.3 (internal quotes omitted).

This limited standard at the pleading stage is consistent with the "assumption [on motion to dismiss] that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002), and *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations")).

B. The great weight of authority among the federal courts of appeals rejects the proposition that *Iqbal* requires the court to choose the most likely inference from factual pleadings.

It is a "proposition that is at the heart of the application of the Rule 12(b)(6) motion," that not only is the complaint to be construed in the light most favorable to the plaintiff and its factual allegations taken as true, but that "all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader." 5B Charles Alan Wright & Arthur R. Miller, *et al.*, Fed. Prac. & Proc. Civ. § 1357 (3d ed. 2004).

The courts of appeals have universally followed this proposition in applying the plausibility standard required by *Iqbal*. *See, e.g.*, *Najas Realty, LLC v. Seekonk Water Dist.*, 821 F.3d 134, 140 (1st Cir. 2016) ("We take all well-pleaded facts in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor."); *Lowinger v. Morgan Stanley & Co. LLC*, 841 F.3d 122, 126 (2d Cir. 2016) ("Upon review of a dismissal of a complaint under Fed. R. Civ. P. 12(b)(6), the facts, and inferences to be drawn from those facts, are viewed in the light most favorable to the plaintiff."); *Bolick v. Northeast Indus. Servs. Corp.*, No. 16-2463, 2016 WL 6804922, at *1 (3d Cir. Nov. 17, 2016) (same); *Harbourt v. PPE Casino Resorts Maryland, LLC*, 820 F.3d 655, 658 (4th Cir. 2016) ("we . . . construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff."); *Leal v. Corpus Christi-Nueces Cnty. Pub. Health Dist.*, 647 Fed. Appx. 514, 515 (5th Cir. 2016) (same); *Doe v.*

Cummins, No. 16-3334, 2016 WL 7093996, at *5 (6th Cir. Dec. 6, 2016) (". . . drawing all reasonable inferences in the plaintiff's favor"); *Berger v. Nat'l Collegiate Athletic Ass'n*, No. 16-1558, 2016 WL 7051905, at *2 (7th Cir. Dec. 5, 2016) (same); *K.B. v. Perez*, No. 16-1155, 2016 WL 7030320, at *2 (10th Cir. Dec. 2, 2016) (same); *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 975 (11th Cir. 2016) (same).

This foundational proposition necessarily suggests that a reasonable inference is sufficient and need not be the most probable inference, or one that is more likely than an alternative inference that favors the defendant. This Court strongly indicated as much in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 329 (2007). The Court there addressed the requirement in the Private Securities Litigation Reform Act of 1995 that a pleading "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4. Justice Scalia argued that "the test should be whether the inference of scienter (if any) is more plausible than the inference of innocence." 551 U.S. at 329 (Scalia, J., concurring). This Court rejected that pleading standard as too stringent. *Id* at 324 n.5. Certainly if more-likely-than an alternative inference is too high a pleading standard under a statute that demands enhanced pleading, it is surely too high a standard under Federal Rule of Civil Procedure 8.

Consequently, the federal courts of appeals have widely held that *Iqbal* does not require a plaintiff on motion to dismiss, to plead an interpretation of the facts that is more probable or likely than defendant's interpretation, and they have found reversible error

where district courts have weighed opposing inferences and chosen the likelier. For example, the First Circuit found it reversible error for the district court to dismiss plaintiff's cause of action where the court "improperly occupied a factfinder role when it both chose among plausible alternative theories interpreting defendants' conduct and adopted as true allegations made by defendants in weighing the plausibility of theories put forward by the parties." *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 50 (1st Cir. 2013); *see also Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012), cert. denied, 133 S. Ct. 846 (2013) (The court "may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible."); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 341 n.42 (3d Cir. 2010) (*Iqbal* "does not require as a general matter that the plaintiff plead facts supporting an inference of defendant's liability more compelling than the opposing inference.").

The Fourth Circuit cautioned, "[w]hen a court confuses probability and plausibility, it inevitably begins weighing the competing inferences that can be drawn from the complaint. But it is not our task at the motion-to-dismiss stage to determine 'whether a lawful alternative explanation appear[s] more likely' from the facts of the complaint." *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425 (4th Cir. 2015) (quoting *Houck v. Substitute Trustee Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015)). *See also Shandong Yinguang Chem. Indus. Joint Stock Co. v. Potter*, 607 F.3d 1029, 1032 (5th Cir. 2010) ("The court's task [on a Rule 12(b)(6) motion] is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of

success," (citing *Iqbal*, 556 U.S. 662)); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 458 (6th Cir. 2011) ("Often, defendants' conduct has several plausible explanations. Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage.").

As the Seventh Circuit in a widely-cited decision by Judge Diane P. Wood explained:

> 'Plausibility' in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not. . . . In other words, the court will ask itself *could* these things have happened, not *did* they happen. For cases governed by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences.

Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010) (emphasis in original). *See also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) ("Requiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the complaint is construed most favorably to the nonmoving party, and would impose the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject.") (internal quotation and citation omitted); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) ("If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a

motion to dismiss under Rule 12(b)(6).") *Speaker v. U.S. Dep't of Health & Human Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371, 1386 (11th Cir. 2010) (Plaintiff "need not prove his case on the pleadings—his Amended Complaint must merely provide enough factual material to raise a reasonable inference, and thus a plausible claim."); *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1339-40 (Fed. Cir. 2012) (Finding reversible error in the district court's failure to draw all reasonable inferences in favor of the non-moving party. "*Twombly* did not alter this basic premise. Nothing in *Twombly* or its progeny allows a court to choose among competing inferences as long as there are sufficient facts alleged to render the non-movant's asserted inferences plausible.").

As the foregoing decisions indicate, Petitioners' proposal—that a plaintiff's claim is subject to dismissal where the court finds that defendant's explanation of or inferences from the facts are more likely than plaintiff's—violates both the principle that plaintiff's factual allegations must be taken as true and the principle that all reasonable inferences from the pleadings must be draw in favor of the pleader. In addition, AAJ submits, Petitioner's probability requirement at the pleading stage violates the Seventh Amendment right to trial by jury.

III. THE PLEADING STANDARD PROPOSED BY PETITIONERS VIOLATES THE SEVENTH AMENDMENT.

A. The constitutional right to trial by jury is of fundamental importance and this Court has historically guarded against any interference with that right.

Then-Justice Rehnquist emphasized that the "right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338 (1979) (Rehnquist, C.J., dissenting). Its scope and effect "perhaps more than with any other provision of the Constitution, are determined by reference to the historical setting in which the amendment was adopted." *Id.* at 339. That historical setting is notable for "the passion and violence with which the civil jury was defended during the Revolutionary era and the constitutional ratification debate." Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 146-47 (1991).

The colonists had bitterly resented England's transfer of civil disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by the Crown's judges. *See* Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* 69-72 (1957). Their list of grievances against the King, justifying their break with England, included "depriving us, in many cases, of the Benefits of Trial by Jury." *Declaration of Independence* ¶ 20 (1776). "The struggle over jury rights was, in reality, an important

aspect of the fight for American independence and served to help unite the colonies." Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 596 (1993). For that reason, many in the founding generation demanded a Bill of Rights that would preserve the civil jury from encroachment by federal judges. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 450-51 (1996) (Scalia, J., dissenting).

But on September 12, 1787, as the Constitutional Convention was ending its work in Philadelphia, James Wilson "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." The motion to add that right, however, failed. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 293-94 (1966). To many, that omission suggested "virtual abolition of the civil jury," and it very nearly doomed ratification of the entire constitution. *Id.* 295-98; Charles W. Wolfram, The *Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 672 n.89 (1973). Only after the Federalists agreed to add a Bill of Rights containing such a jury guarantee did the Constitution win ratification. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830); Henderson, *supra*, at 295-98.

Historically, this Court has rigorously safeguarded this right. "During the first 180 years of the Bill of Rights, the constitutional guarantee most frequently and aggressively enforced by the Supreme Court was the seventh amendment right to trial by jury in civil cases." Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237, 237 (1989). The threat to trial by jury in modern times, Justice Hugo Black

and Chief Justice William Rehnquist have both warned, is not its outright elimination but "the gradual process of judicial erosion" of the Seventh Amendment guarantee under the guise of interpreting procedural rules. *Parklane Hosiery Co.*, 439 U.S. at 339 (Rehnquist, J., dissenting) (quoting *Galloway v. United States*, 319 U.S. 372, 397 (1943) (Black, J., dissenting)).

Although this Court in *Iqbal* indicated that the efficient operation of the federal judiciary and protection of defendants from burdensome discovery are important factors, AAJ urges the Court to heed the cautionary warning raised by then-Justice Rehnquist against expanding inroads on the jury right:

> [N]o amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791. The rule otherwise would effectively permit judicial repeal of the Seventh Amendment . . . The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury was surely a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the right secured by the Amendment.

Parklane Hosiery Co., 439 U.S. at 348 (Rehnquist, J., dissenting). As this Court has repeatedly declared:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), *quoted in Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990).

AAJ submits that curtailment of the jury right through the use of unduly stringent pleading requirements to pretermit a jury determination of the facts of a case warrants such scrutiny.

B. The requirement suggested by Petitioners would interfere with the jury's constitutional factfinding responsibility.

Petitioners' proposed pleading standard, under which the court must dismiss plaintiff's complaint if the factual pleadings and the inferences therefrom are not more likely than competing inferences that favor defendants, represents an intrusion into the factfinding role of the jury that the Constitution does not permit.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any

> Court of the United States, than according to the rules of common law.

U.S. Const. amend. VII.

This Court has long held that the "common law" in this context refers to the common law of England existing at the time the amendment was ratified. This Court has explained:

> Since Justice Story's day, *United States v. Wonson*, 28 F. Cas. 745, 750 (No. 16,750) (CC Mass. 1812), we have understood that "[t]he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted." *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935). In keeping with our longstanding adherence to this "historical test," Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 640-643 (1973), we ask, first, whether we are dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was, *see, e.g.*, *Tull v. United States*, 481 U.S. 412, 417 (1987).

Markman v. Westview Instruments, 517 U.S. 370, 376 (1996). The Seventh Amendment "has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791." *Dimick*, 293 U.S. at 487. *See also Thompson v. Utah*, 170 U.S. 343, 350 (1898) (stating that "common law" in the Seventh

Amendment refers to English common law in 1791); *cf. Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) (The right extends both to common-law causes of action and to "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century.") (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989)).

Thus, where a party has a constitutional right to a jury trial, a new procedure that affects the jury trial right (including taking the right away) is constitutional if the procedure preserves the substance of the English common law jury trial in 1791. *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 379-80 (1913). For example, in *Dimick v. Schiedt*, the Court determined that additur, a procedure under which the court could augment a jury's award of damages based on a finding of inadequacy, violated the Seventh Amendment because "the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to increase the amount of damages awarded by a jury." 293 U.S. at 482. Conversely, the court indicated that remittitur, based upon longstanding practice in American courts and "some support in the practice of the English courts prior to the adoption of the Constitution," would be upheld, at least where conditioned on grant of a new trial. *Id.* at 485. *Cf. Hetzel v. Prince William Cnty., Va.*, 523 U.S. 208, 211 (1998) ("[R]equiring the District Court to enter judgment for a lesser amount than that determined by the jury without allowing petitioner the option of a new trial, cannot be squared with the Seventh Amendment.").

A procedure unknown to common law which permits a court to take a case from the jury may nonetheless be upheld under the Seventh Amendment if the procedure preserves the essential substance of the jury trial—the jury's responsibility to determine questions of fact. The Court explained in *Slocum*, 228 U.S. 364, that the aim of the Seventh Amendment is not to preserve "mere matters of form and procedure" but rather the "substance" of the right to a jury trial. *Id.* at 378. The Court identified "the right so preserved [as] the right to have the issues of fact presented by the pleadings tried by a jury. *Id.* at 399.

The closest analogous procedure to pretrial dismissal known to the common law is the demurrer to the pleadings. As the Advisory Committee's Notes to the Federal Rules of Civil Procedure state, "Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action." Fed. R. Civ. P. 12(b)(6), Advisory Committee's Notes to the Federal Rules of Civil Procedure, Notes to the 1948 amendments. Indeed, demurrer to the pleadings was the only pretrial procedure at common law "that would allow a judge to determine before trial that a case presented no issue to be decided by a jury, or that an issue in a case should be withheld from the jury." Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 Wash. U. L.Q. 687, 706 n.111 (2004) (quoting James Oldham, *The Seventh Amendment Right to Jury Trial: Late-Eighteenth-Century Practice Reconsidered, in Human Rights and Legal History: Essays in Honour of Brian Simpson* 225, 231 (Katherine O'Donovan & Gerry R. Rubin eds., 2000)).

Under the common law demurrer to the pleadings the demurring party "admits the truth of those facts, and all reasonable inferences to be drawn therefrom." *United States v. Des Moines Nav. & Ry. Co.*, 142 U.S. 510, 544 (1892). The non-movant's "allegations must be taken as true; and all that can be reasonably inferred from those allegations . . . must also be held to be true." *Hammond v. Mason & Hamlin Organ Co.*, 92 U.S. 724, 726 (1875).

A similar common law procedure was the demurrer to evidence which was exercised during trial, commonly at the close of the plaintiff's evidence. *See, e.g., Gibson v. Hunter*, 126 Eng. Rep. 499 (H.L. 1793). As with the demurrer on the pleadings, the demurrant to the evidence at common law in England "had to admit all facts shown in evidence against him *and every adverse inference* that a jury could draw from that evidence." Henderson, *supra*, at 304-05 & n.48 (emphasis added). This Court, as well, has stated that a "demurrer to evidence admits not only the facts stated therein, *but also every conclusion which a jury might fairly or reasonably infer therefrom.*" *Parks v. Ross*, 52 U.S. 362, 373 (1850) (emphasis added). *See Fowle v. Alexandria*, 24 U.S. (11 Wheat.) 320, 323 (1826) (A demurrer to the evidence admits "whatever the jury may reasonably infer from the evidence.").

The crucial aspect of the demurrer for Seventh Amendment purposes is that, because the movant admitted the truth of every alleged fact and the inferences drawn therefrom, the common law court undertook no assessment of the facts or their weight or their comparative likelihood. The court simply accepted the facts pled by the plaintiff and the inferences from those facts that supported plaintiff's claim, however improbable the court might deem

them. As Professor Arthur Miller has noted, "The Federal Rules replaced the demurrer and the code motion to dismiss with the Rule 12(b)(6) motion." Yet those common law procedures "focused exclusively on the legal sufficiency of the plaintiff's statement of each substantive element of a cause of action, and did not involve a judicial assessment of the case's facts or actual merits." Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1 (2010).

The standard proposed by Petitioners for passing on a motion to dismiss under Rule 12(b)(6), by contrast, does not limit the court to deciding questions of law upon admitted facts and inferences. Petitioners would have the court make an assessment of the inferences pled by the plaintiff compared to alternative inferences favoring defendants and adopt for its analysis those inferences that are more probable or likely. In short, the court would take the case away from the jury, not as a consequence of its decision of a question of law, but on the basis of its interpretation of the pleaded facts.

Such a procedure clearly violates the Seventh Amendment:

> The aim of the amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby . . . issues of law are to be resolved by the court and issues of fact

> are to be determined by the jury under appropriate instructions by the court.

Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935).

As this Court has also emphasized, the issue "of vital significance in trial by jury is that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law." *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 498 (1931). For this reason, protecting the "substance" of the right to a jury trial as it existed in 1791 "requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative." *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 424 (1913).

Consequently, the pleading requirement proposed by Petitioners—that the court weigh plausible inferences from the facts and select the one which is most likely—would violate the substance of the right to jury trial protected by the Seventh Amendment.

CONCLUSION

For the foregoing reasons, AAJ asks this Court to affirm the decision of the court of appeals.

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Respectfully submitted,

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